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Supreme Court, U.S.
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No. 95-133

In the Supreme Court of the United States

OCTOBER TERM, 1995

CHESLEY T. MEARS, ET AL., PETITIONERS

v.

FEDERAL DEPOSIT INSURANCE CORPORATION, AS LIQUIDATING AGENT/RECEIVER OF OLYMPIC INTERNATIONAL BANK AND TRUST

ON PETITION FOR A WRIT OF CERTIORARI TO THE APPEALS COURT OF MASSACHUSETTS

BRIEF FOR THE RESPONDENT IN OPPOSITION

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16 pp

QUESTION PRESENTED

Whether title to property currently held by the FDIC as receiver of a failed bank is subject to claims by petitioners, where petitioners took no action to enforce their alleged rights for a period of more than 48 years.

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OPINIONS BELOW

The notice denying further appellate review by the Supreme Judicial Court of Massachusetts (Pet. App. A1) is unpublished, but the decision is noted at 648 N.E.2d 1285 (Table). The opinion of the Massachusetts Appeals Court (Pet. App. A2-A12) is also unpublished, but the decision is noted at 646 N.E.2d 1097 (Table). The order and judgment of the Massachusetts Land Court (Pet. App. A13-A18) is unreported.

JURISDICTION

The judgment of the Massachusetts Appeals Court was entered on March 3, 1995. The Supreme Judicial

Court of Massachusetts denied further appellate review of the Appeals Court decision on April 24, 1995. The petition for a writ of certiorari was filed on July 24, 1995 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1257.

STATEMENT

1. Charles W. Mears died in 1933. He was the owner of a 28-acre parcel of land (the property) situated in the town of Hamilton, Massachusetts. Pet. App. A2. Upon his death, title to the property passed to his wife, his son, and his daughter (the devisees) in equal shares by testamentary devise under the residuary clause of his will. *Id.* at A3-A4. The will of Charles W. Mears was approved for probate on October 13, 1933. Pet. 4. The petitioners, the heirs at law of the devisees, *ibid.*, trace their asserted title to the property to this 1933 testamentary devise.

2. Respondent, the Federal Deposit Insurance Corporation (FDIC), as Liquidating Agent/Receiver of Olympic International Bank and Trust Company (Bank), succeeded to the interest of the Bank as mortgagee of the property after the Bank failed in June, 1992. In 1988, the Bank had made a loan which was secured by a mortgage on the property. When the mortgagor defaulted on the loan, the Bank accepted a deed to the property in lieu of foreclosure of the mortgage. The Bank subsequently deeded the property to its wholly owned subsidiary, the Fort Hill Corporation, which was dissolved by the FDIC in 1993 after the Bank closed. At that point, title to the property reverted to the FDIC as receiver of the Bank.

The mortgagor's title to the property was derived from a series of conveyances beginning with a Treas-

urer's Deed to the Town of Hamilton, dated November 29, 1941. The FDIC's title to the property ultimately derives from that Treasurer's Deed.

3. In 1935, after the death of Charles W. Mears, the Town of Hamilton assessed a real estate tax of $40.04, for tax year 1935, against the immediate heirs of Charles W. Mears (the devisees). Pet. App. A3. The tax was not paid. The town made demand for payment of taxes due upon "Charles W. Mears (heirs)" in April, 1936. *Ibid.* When no payment was made, the town gave notice of its intention to take the property by publication in the Salem Evening News on July 15, 1936, and by posting notices at the town hall and local post office, all in conformity with the statutes then applicable. *Ibid.*[1] When no response was received, the Town took the property for nonpayment of taxes and recorded an instrument of taking in the Essex County Registry of Deeds, dated July 30, 1936. *Id.* at A4.

4. On or about October 7, 1941, the commissioner of corporations and taxation for the Commonwealth of Massachusetts executed an affidavit, duly recorded, certifying that the property was of low value and insufficient to satisfy the tax, interest and charges due. Pet. App. 4A.[2] On or about November 29, 1941, after having offered the property at public auction,[3] the Town acquired the property by Treasurer's

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[1] See Mass. Gen. L. ch. 60, § 53 (1936) (Pet. App. A27).

[2] See Mass. Gen. L. ch. 60, § 79 (1941) (Pet. App. A34-A35).

[3] Section 79 required public notice of the auction "by posting a notice of the sale in some convenient and public place in the town fourteen days at least before the sale." Pet. App. A35.

Deed,[4] and on December 2, 1941, the deed was recorded in the Essex County Registry of Deeds. *Ibid.*

5. On April 10, 1990, petitioners commenced this action in the Massachusetts Land Court against the Fort Hill Corporation (the Bank's subsidiary), the owner of the property at the time, to determine title to the property and to establish an appurtenant easement. Pet. App. A5, A19-A20. The action was brought pursuant to an Order of the Land Court to Try Title, dated February 12, 1990 (see Mass. Gen. L. ch. 240, § 1 (1986)). Pet. App. A19-A20. The parties filed cross-motions for summary judgment. Petitioners asserted in their motion for summary judgment that the town of Hamilton had failed both "to exercise reasonable diligence in identifying interested parties" and "to give constitutionally adequate notice of the low value tax taking which gave rise to the 1941 [Treasurer's] Deed, in comportment with due process of law." *Id.* at A21. Thus, petitioners argued that the tax title was void *ab initio*, rendering defective all subsequent conveyances deriving from the Treasurer's Deed of 1941. *Ibid.*

6. After a hearing, the Land Court rejected petitioners' arguments, concluding that the town's demand for payment of taxes was sufficient to give notice of the ensuing tax taking and that the town had complied with all procedural requirements then in effect for the sale of low value land under Sections 79 and 80 of chapter 60 of the General Laws of Massachusetts (1941). The Land Court also ruled that petitioners' claim, insofar as it was predicated on an alleged deficiency in notice prior to the taking, was barred by operation of Section 80C of chapter 60 of the General

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[4] See Mass. Gen. L. ch. 60, § 80 (1941) (Pet. App. A36).

Laws of Massachusetts (1986). Section 80C, enacted in 1986, provides that a duly recorded conveyance of land by a city or town pursuant to Section 79 or 80 shall not be "subject to any * * * defects, irregularities, or omissions" with respect to the "notice or procedure for the taking and sale or conveyance," if a period of 20 years has elapsed since the conveyance or sale was recorded and no proceeding has been commenced "on account of such defect, irregularity, or omission" during that time. Pet. App. A37.[5] The Land Court therefore declared that the FDIC is the present legal title owner of the property and granted summary judgment for respondent. *Id.* at A18.

7. The Massachusetts Appeals Court affirmed. Pet. App. A2-A12. The Appeals Court made three findings. First, it found that the record clearly established the fact that the tax collector in the Town of Hamilton had served a legally sufficient demand for payment of taxes due on the heirs of Charles W. Mears in 1936, before the property was taken for nonpayment. *Id.* at A6-A10.[6] Based on that fact, the

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[5] Nothing in the record shows an intervening challenge to the Treasurer's Deed to the Town of Hamilton from December, 1941, until the filing of the Land Court action in April, 1990.

[6] Section 16 of chapter 60 of the General Laws of Massachusetts (1936), as written at the time, provided in pertinent part (Pet. App. A26):

> The collector shall, before selling the land of a resident, or non-resident, * * * serve on him a statement of the amount thereof with a demand for its payment. * * * If the heirs of a deceased person * * * are jointly assessed, service need be made on only one of them. * * * Demand shall be made by the collector by mailing the same to the last

court ruled that the subsequent taking of the property was not invalid for lack of notice. *Id.* at A10. Second, the court rejected as untimely a challenge to the validity of the commissioner's low value determination pursuant to Section 79. *Id.* at A10-A11. Third, the court affirmed the Land Court's ruling that petitioners' challenge to the notice procedures for the taking and sale is barred by Section 80C. *Id.* at A11.

8. On April 24, 1995, the Supreme Judicial Court of Massachusetts declined to grant further appellate review. Pet. App. A1.

ARGUMENT

1. Petitioners' factual and legal arguments regarding lack of notice are without merit.

a. Petitioners rely on this Court's decision in *Mennonite Board of Missions* v. *Adams*, 462 U.S. 791 (1983), to argue that the Town's failure to give "actual notice" of the taking of the property in 1936 or of the tax sale of the property in 1941 violated due process and voids both the taking and the sale. Pet. 12-17 & n.9. In *Mennonite*, the Court held that, to satisfy the Due Process Clause, a county must take reasonable steps to provide a mortgagee with actual notice of a proceeding to sell mortgaged property for nonpayment of taxes, so long as the mortgagee's name and address are reasonably ascertainable. 462 U.S. at 798-800. The county officials in that case failed to meet the minimum procedural due process requirements, since the officials, in compliance with the State of Indiana's tax foreclosure laws, merely posted notice

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or usual place of business or abode, or to the address best known to him.

of the tax sale at the county courthouse and published a newspaper notice of the same. *Id.* at 792-794. No notice had been mailed to or served on the petitioner, the mortgagee, despite the fact that the mortgagee was easily identified through the publicly recorded mortgage. *Id.* at 798.

The mortgagee in *Mennonite* not only had no knowledge of the tax sale proceedings, it did not even know that the mortgagor had been delinquent and had failed to pay real estate taxes on the property. 462 U.S. at 792. In the instant case, on the other hand, the state trial and appellate courts each concluded, as a factual matter, that a demand for nonpayment of taxes had been personally served, at least by mail, on one or more of the devisees in April, 1936. Pet. App. A7-A8, A15-A16. The state trial and appellate courts then ruled that actual notice of the demand for nonpayment placed the devisees on constitutionally sufficient notice that a taking would ensue if their delinquency continued, *id.* at A10, A16, a conclusion that is fully consistent with this Court's holding in *Mennonite*.

The *Mennonite* Court stated in dictum that "a mortgagee's knowledge of delinquency in the payment of taxes is not equivalent to notice that a tax sale is pending." 462 U.S. at 800. However, knowledge of that type would have significance to the *owner* of property different from its significance to the mortgagee. The owner has a more direct interest in the property than the mortgagee, cf. *id.* at 799 (noting that publication and posting are especially ineffective for reaching mortgagees "who, although they have an interest in the property, do not make special efforts to keep abreast of such notices"), and only the owner would have direct knowledge of whether the de-

linquency continued unabated. Unless a mortgagee learns otherwise, a mortgagee might naturally assume that the property owner would satisfy the tax debt in a timely fashion. An owner, however, can reasonably be charged with notice of the legal consequences that are likely to follow once the owner has actual notice of a delinquency.

b. Petitioners urge an expansive reading of *Mennonite*, under which a demand for nonpayment of taxes personally served on the owner of property is insufficient notice that a tax taking might ensue. This case, however, does not appropriately raise that issue because it involves a contested factual record concerning events occurring more than 60 years ago. *Mennonite* involved a mortgagee that acted promptly to vindicate its rights. The tax taking in *Mennonite* occurred in 1977; the two-year redemption period for the mortgaged property ended on August 8, 1979. See 462 U.S. at 794. The mortgagee learned of the tax foreclosure eight days later on August 16, 1979. *Ibid.* When an action to quiet title was brought against the mortgagee in November, 1979, the mortgagee was available to attest to the fact that it had no knowledge of the tax sale prior to August 16, 1979, which was the basis for its due process challenge.

In the instant case, however, petitioners waited nearly 50 years to commence their challenge to the 1941 tax sale. The devisees, the owners of the property during the relevant time period (1936-1941), are no longer alive[7] and thus cannot testify as to their knowledge at that time. Nothing in the record in this case, other than the fact that the $40.04 real estate

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[7] Petitioners describe themselves as the "heirs at law" of the devisees. See Pet. 4.

tax was never paid, indicates whether any of the devisees became aware of the publicly posted and published notices of the 1936 tax taking or the 1941 tax sale. If one of the devisees did have such knowledge but failed to act on it, there would be no procedural due process violation, even if the devisees were not personally served with notice.

c. Petitioners argue that certiorari should be granted "to resolve a direct conflict between federal and state jurisprudence concerning the constitutionality of the statutory notice provisions pertaining to [low value] tax sales conducted under [Mass. Gen. L. ch. 60, § 79 (1941)]." Pet. 10. Petitioners cite *Guaranty Mortgage Corp.* v. *Town of Burlington*, 432 N.E.2d 480 (Mass. 1982), a case decided prior to this Court's decision in *Mennonite*, as the source of the conflict. *Guaranty Mortgage* rejected a procedural due process challenge to Section 79, which allows notice by publication for tax sales of low value property. *Id.* at 485-486.

Guaranty Mortgage does not pose a "direct conflict" with *Mennonite*. To the extent that *Guaranty Mortgage* held that notice by publication of a tax sale is sufficient to protect the interests of mortgagees, that aspect of the case appears to have been overruled by *Mennonite*. To the extent that *Guaranty Mortgage* held that publication by notice is sufficient for owners of property who have already received personal notice by mail of their tax delinquency, that holding poses no necessary conflict with *Mennonite*.

There is also no conflict for this Court to resolve because the Massachusetts Supreme Judicial Court has acknowledged in dictum that *Mennonite* may require reconsideration of certain aspects of *Guaranty Mortgage*, should the appropriate case arise.

See *Christian* v. *Mooney*, 511 N.E.2d 587, 592 n.10 (Mass. 1987) (noting that *Mennonite* casts "some doubt at least on the reasoning in *Guaranty Mortgage*"), cert. denied, 484 U.S. 1053 (1988); see also *Lamontagne* v. *Knightly*, 572 N.E.2d 1375, 1379-1380 (Mass. App. Ct. 1991) (discussing the extent to which *Christian* indicated that *Guaranty Mortgage* has been overruled by *Mennonite*). Unless the Massachusetts courts, having had a full opportunity to revisit the notice procedures in Section 79 tax sales, issue a post-*Mennonite* decision in conflict with that case, any intervention by this Court to resolve an alleged conflict would be premature.

2. Section 80C of chapter 60 of the Massachusetts General Laws, enacted in 1986, provides a 20-year period from the time a tax title is recorded for making a challenge to a taking or conveyance of property utilizing "low value" procedures (Mass. Gen. L. ch. 60, § 79 (1941)) based on deficiencies in notice. Petitioners waited more than 48 years after the tax title was recorded in 1941, and nearly four years after the enactment of Section 80C in 1986, to bring their claim. The state trial and appellate courts correctly ruled that petitioners' claim was time-barred. Pet. App. A11-A12, A17-A18.

Petitioners assert (Pet. 17-20) that constitutional defects in procedures, "including defects based on want of legally mandated notice" (Pet. 18), cannot be rectified by a purely retroactive, curative statute, unless the statute provides for a "reasonable time" after its enactment "within which any party affected could assert his rights." *Saranac Land & Timber Co.* v. *Comptroller of New York*, 177 U.S. 318, 330 (1900). Cf. *id.* at 324 (holding that six months is a reasonable period for interested parties to assert

their rights following the enactment of a statute quieting title to certain deeds that were sold for nonpayment of taxes); *Texaco, Inc.* v. *Short*, 454 U.S. 516, 532-533 (1982) (upholding a state statute that automatically extinguished mineral interests that had not been used for 20 years, without any notice to owners, because the statute included a two-year grace period, which "afford[ed] the citizenry a reasonable opportunity to familiarize itself with its terms and comply").

Section 80C does not expressly provide for a grace period during which interested parties could bring claims against tax titles that were recorded more than 20 years prior to July 21, 1986, the effective date of the statute. If a claim contesting a tax title had been brought within a reasonable time after July, 1986, a state court might have construed the statute to allow such a grace period in order to save the statute from constitutional attack. Petitioners, however, raised their procedural due process claim for the first time in June, 1993, nearly seven years after the enactment of Section 80C. See Pet. 7. Because of the tardiness of their claim, petitioners are in no position to complain about the absence of a reasonable grace period.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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